No. 17-204

IN THE

Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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August 2018

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INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of $540 billion. CCIA believes that open and competitive markets together with original, independent, and free speech foster innovation. It regularly files *amicus* briefs in this and other courts on issues including competition law, intellectual property, privacy, and cybersecurity. *See, e.g., TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (patents); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (copyright); *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (antitrust). Most recently, CCIA submitted an *amicus* brief in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), which—like this case—involved the application of antitrust laws to multi-sided platform services. Many CCIA members offer digital platform services, providing numerous procompetitive benefits. CCIA members operate in digital markets

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* or their counsel made such a monetary contribution. Counsel for all parties consented to the filing of this brief.

with "extremely low barriers to entry" and that are therefore "characterized by vibrant competition."[2]

CCIA's principal concern in this case is that the Ninth Circuit's decision, if adopted by this Court, could have significant adverse effects on competition by deterring the development of innovative platform business services. The Ninth Circuit's formalistic focus on "distributors" and "manufacturers" for purposes of determining antitrust standing ignores the recent technological and business development of multi-sided digital platform services and exposes these innovative services to claims for treble damages by plaintiffs relying on "pass-on" theories of harm. That result is contrary to this Court's precedents recognizing that standing to recover treble damages under the federal antitrust laws is limited to direct purchasers and does not support claims by others alleging damages that are passed on. If businesses offering digital platform services risk being subjected to such massive, duplicative treble-damages claims simply for connecting buyers and sellers, they likely will be less inclined to offer and extend these services. Because the Ninth Circuit's ruling would chill that procompetitive activity, counter to the purposes of the Clayton Act and this Court's precedents, CCIA urges this Court to reverse the decision below and reaffirm that plaintiffs lack standing to seek damages based on a "passed-on" theory of injury.

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[2] Computer & Communications Industry Association, Antitrust, http://www.ccianet.org/issues/antitrust/page/3.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent decades, the economy has been increasingly driven by companies offering digital, multi-sided platform services, ranging from e-commerce sites like Etsy to dining reservation sites like OpenTable to home buying sites like Redfin.[3] Rather than converting raw materials into products as do traditional manufacturers, businesses offering platform services—also known as "matchmakers"—harness technologies to serve multiple, interrelated sets of customers and offer valuable products and services to sellers and consumers alike.

Platform services have boosted the economy, and their benefits have flowed most directly to consumers and small sellers. Among other benefits, platform services allow consumers to make instant, side-by-side product comparisons; facilitate connections between buyers and sellers by lowering discovery and transaction costs; increase consumer confidence with tools like user ratings; enhance the quality of seller content through effective curation; and lower start-up costs for small sellers.

The decision below puts these platform services—and the benefits they provide—under threat. The

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[3] *See* David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 1, 8 (2016). Platforms can be referred to as "two-sided" where they connect two distinct groups (often buyers and sellers). We use the term "multi-sided" to refer to platforms that may connect more than two distinct sets of consumers. For example, meal-delivery services, like DoorDash, connect at least three separate groups: (1) consumers, (2) restaurants, and (3) delivery personnel.

Ninth Circuit's rule would allow an action for treble damages against any company with which the plaintiff has transacted, regardless of whether the claims arise from alleged pass-on damages, so long as that defendant can be labeled a "distributor." *See* Pet. App. 17a.

The Ninth Circuit's decision rests on at least three errors. *First*, the court of appeals failed to recognize that Apple's role, like that of other multi-sided platforms, in connecting app developers with app users is fundamentally different from that of "distributors" operating in traditional vertical supply models like those at issue in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*. The resulting decision contradicts this Court's admonition that antitrust law be based on "actual market realities" rather than "formalistic distinctions." *Am. Express*, 138 S. Ct. at 2285 (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)).

Second, Respondents do not have antitrust standing under Section 4 of the Clayton Act because they are "indirect purchasers" of app-*distribution* services—the service allegedly monopolized, of which the app developers and not Respondents are the direct purchasers. And although Respondents allegedly paid "some portion of the monopoly overcharge," they did so "only because the previous purchaser [the app *developer*] was unable to avoid that overcharge." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998).

Third, by purporting to evaluate solely whether Apple is a "distributor," the court of appeals asked the

wrong question. The dispositive question to determine whether *Illinois Brick* bars a suit due to lack of antitrust standing is whether the plaintiff relies on a "pass-on" theory of injury. If so, the plaintiff lacks standing because such an expansive interpretation would expose a defendant to duplicative treble-damages recoveries far in excess of what Section 4 of the Clayton Act permits. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977) (deeming unacceptable the "serious risk of multiple liability for defendants"). The holding of *Illinois Brick* does not turn on whether the arbitrary label of "distributor" may be applied to the defendant.

The implications of adopting the Ninth Circuit's erroneous legal reasoning are especially grave for businesses offering platform services. Because multi-sided platforms must, by definition, interface with multiple interrelated groups of users, they are disproportionately affected by a rule that extends antitrust standing to multiple sets of consumers on different sides of their platforms for the same ultimate damages claim.

Platform-based businesses will be harmed by the Ninth Circuit's failure to adhere to *Illinois Brick*, but ultimately consumers and small sellers will pay the price. Faced with the potential for six-fold or greater damages in class action litigation, including as leverage for the resolution of even meritless antitrust claims, businesses may be less likely to offer or develop platform services in the future. Because consumers and smaller sellers have enjoyed the greatest gains under the platform model, those same groups can expect to experience the most serious

losses should innovation and competition for platform services be deterred.

For these reasons, the decision of the court of appeals should be reversed.

ARGUMENT

I. The Ninth Circuit's Formalistic Approach Improperly Exposes Defendants to "Pass-On" Theories of Harm that Lead to Duplicative Damages Claims in Conflict with this Court's Precedents and the Clayton Act

In *Illinois Brick*, this Court held that the Clayton Act's treble-damages remedy is not available to a plaintiff who relies on a "pass-on theory" of injury—that is, harm based on a defendant unlawfully overcharging a third party, which the third party passes on to the plaintiff. 431 U.S. at 736. The *Illinois Brick* prohibition against "pass-on" injury claims follows logically from the Court's earlier decision in *Hanover Shoe*, which held that the first direct purchaser should be entitled to recover the full amount of an alleged overcharge. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 493–94 (1968). Given that the first purchaser can recover 100 percent of an overcharge, allowing other purchasers to whom such costs might be passed on also to recover damages "would create a serious risk of multiple liability for defendants," a result not intended by Section 4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 730; *see also Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 212 (1990) ("The *Illinois Brick* rule . . . serves to eliminate multiple recoveries.").

The Ninth Circuit's decision below flatly contradicts these principles. It expands the scope of liability well beyond the treble damages Congress provided for by statute. By granting standing to Respondents to pursue a pass-on theory of harm, the court of appeals "'open[ed] the door to duplicative recoveries' under § 4," *Illinois Brick*, 431 U.S. at 731 (citation omitted), and invited the very harm *Illinois Brick* aimed to prevent.

The Ninth Circuit's erroneous decision is rooted in at least three layers of faulty analysis.

A. The Ninth Circuit Misunderstood that Apple's Multi-Sided Platform Service Differs Significantly from the Role of the Traditional "Distributor"

First, the Ninth Circuit placed undue weight on the conventional business models analyzed in prior cases, resulting in a decision that prioritizes labels over market realities. Rather than examining the rationales articulated in *Hanover Shoe*, *Illinois Brick*, and *Utilicorp*—including their prominently stated concerns about duplicative treble damages—the Ninth Circuit looked only at the surface-level facts of those cases, which involved classic vertical supply chain models in traditional industries for shoes,[4] concrete blocks,[5] and natural gas.[6] In placing outsize importance on these particular factual scenarios, and neglecting *Illinois Brick*'s basic principles, the court of

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[4] *Hanover Shoe*, 392 U.S. at 483–84.

[5] *Illinois Brick*, 431 U.S. at 726–27.

[6] *Utilicorp*, 497 U.S. at 204.

appeals missed the forest for the trees.

The result is a decision that embraces "formalistic distinctions" at the expense of "actual market realities," an approach that this Court has specifically criticized in antitrust law. *Am. Express*, 138 S. Ct. at 2285 (quoting *Eastman Kodak*, 504 U.S. at 466–67). Assigning every economic actor to one of two categories—either "manufacturer" or "distributor"—is misconceived. That binary approach fails to take into account the market realities that have developed through new technological and business models, including the digital platform at issue here. Instead, the court of appeals attempted to shoehorn Apple's iPhone platform into the traditional vertical supply chain model. But Apple—like other digital platform services—does not fit into the conventional "distributor" category. The result is an expansion of antitrust standing incompatible with the principles of *Illinois Brick*.

B. The Ninth Circuit Failed to Appreciate that Respondents Are Indirect Purchasers of the Alleged Monopolized Service

Second, the Ninth Circuit failed to correctly identify the allegedly monopolized service, as well as the fact that Respondents are *in*direct purchasers of that service. As used in *Illinois Brick*, the term "direct purchaser" did not extend standing to every party that had *some* dealings with the defendant. Instead, "direct purchaser" was used to describe the party that first purchased the good or service at issue—in other words, the party suffering "direct" and not "passed-on" injury. Here, the allegedly "monopolized" product is

Apple's app-distribution services for developers. *See* Pet. App. 41a (¶ 3). At best, Respondents are *in*direct purchasers of this service.[7]

In sharp contrast to the Ninth Circuit's flawed analysis, the Eighth Circuit's decision in *Campos v. Ticketmaster Corporation*, 140 F.3d 1166 (8th Cir. 1998), comports with this Court's precedents and well-established principles of antitrust standing. There, the court of appeals held that the plaintiff ticket-buyers were indirect purchasers because, while they may have paid "some portion of the monopoly overcharge" to the defendant platform service, they did so "only because the previous purchaser [i.e., the concert venue] was unable to avoid that overcharge." *Campos*, 140 F.3d at 1170; *see also id.* at 1169 ("An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser."). The same is true here: Respondents are "indirect purchasers" for the purpose of antitrust standing because any overcharge they paid is only because app *developers* were allegedly unable

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[7] By extending the scope of liability to those only remotely affected by the alleged conspiracy, the Ninth Circuit's decision also dramatically expands the pool of potential antitrust plaintiffs in a lawsuit against a platform service. That outcome is even more concerning where lawsuits are likely to take the form of massive consumer class-action complaints that put a tremendous pressure on defendants to settle even meritless claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (describing burdensome nature of discovery expenses for antitrust class actions).

to avoid an overcharge, which was then passed along.[8] Indeed, Respondents have asserted that app prices are higher because app developers "mark-up the price [of their apps]" to recover part or all of Apple's commission. Pepper CA9 Br. 35 n.10.

C. The Ninth Circuit's Decision Ignores that Respondents Rely on a Pass-On Theory of Harm that Subjects Multi-Sided Platform Services to a Risk of Duplicative Recovery

Finally, and most importantly, by dwelling on traditional supply chain models and prioritizing labels over substance, the Ninth Circuit asked the wrong question. The relevant consideration is not whether a defendant can be characterized as a "distributor" of some product or service, or whether the defendant had any interaction with the plaintiff.

Instead, under *Illinois Brick*, courts should evaluate whether a plaintiff is relying on a "pass-on" theory that exposes defendants to duplicative treble-damages claims. *See* 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007) ("When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important

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[8] Respondents lack standing regardless of whether app developers in fact sue Apple. This Court has repeatedly rejected claims that a direct purchaser may lack the incentive to sue. *See Illinois Brick*, 431 U.S. at 746; *UtiliCorp*, 497 U.S. at 214 (rejecting request to expand antitrust standing where direct purchasers "lack the incentive to prosecute § 4 cases").

that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects.").

There can be no question that Respondents rely on a pass-on theory of injury. Respondents are consumers who purchased iPhone apps. They allege that Apple monopolized the distribution of these apps; that the 30 percent commission that Apple charged the app developers is supracompetitive; and that the supracompetitive commission rate in turn caused app developers to increase their prices to consumers. Stated more simply, Respondents allege that app developers increased their prices to consumers in order to "pass on" the overcharge for distribution services suffered by the app developers due to Apple's alleged supracompetitive 30-percent commission. Respondents' claim is thus based on their allegation that they "paid more for their iPhone apps than they would have paid" in the absence of the alleged monopolization. Pet. App. 53a (¶ 45).

The Ninth Circuit's allowance of such a "pass-on" theory to support standing for Respondents threatens to subject Apple to duplicative treble-damages claims because the suit by consumers would be in addition to any suit brought by a direct purchaser who would rightly have standing based on such allegations. Indeed, the Ninth Circuit forecasted this duplicative damages exposure. While declining to "address the question whether Apple sells distribution services to app developers within the meaning of *Illinois Brick*," the court noted that, if Apple did sell such services, "this would necessarily imply that the developers, as

direct purchasers of those services, could bring an antitrust suit against Apple." Pet. App. 20a. This explicitly acknowledges that, under the Ninth Circuit's theory, manufacturers of physical goods are subject to less antitrust liability than companies providing matchmaking services.

The potential for duplicative damages is not merely a practical concern but a statutory imperative. Section 4 of the Clayton Act authorizes "threefold" damages recovery, but no more. 15 U.S.C. § 15(a).

II. The Decision Below Converts a Key Virtue of Digital Platform Services into Potential Antitrust Liability in Disregard of Modern Market Realities

Multi-sided, digital platform services drive major portions of today's digital economy.[9] Where many businesses add value by turning raw materials into finished products or delivering products to end users, platform services create value by bringing market participants together, reducing practical barriers and transaction costs in the process. A digital platform service brings together different sides of a transaction, helping buyers find sellers and vice-versa. Where the

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[9] *See* Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 8 ("Three of the five most valuable companies in the world in 2015 . . . use [the multi-sided platform] model. So do seven of the ten start-ups with the highest market values . . . .") (citation omitted); *see also* Joshua D. Wright & John Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 Geo. Wash. L. Rev. 2130, 2135–36 (2015) ("Platforms are ubiquitous in the modern economy.").

traditional manufacturing business model relies on vertical supply chains, the platform business model offers a "place that helps [to connect] different types of customers."[10]

Digital platforms bear some resemblance to more familiar forums, like shopping malls and classified ads. But companies at the leading edge of technological innovation—including many of CCIA's members—have harnessed newly-available technology to refine, expand, and transform the platform business model. As a result, platform services now bring together vast, interrelated sets of buyers and sellers, yielding enormous benefits for both groups. The pervasive influence of platforms has led prominent economists to declare the arrival of a new "platform age."[11]

The decision below ignores—and threatens to upset—these business and technological innovations. As discussed, the Ninth Circuit relied solely on simplistic notions of "manufacturer" and "distributor," prioritizing labels over substance despite well-settled

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[10] Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 16; *see also* David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, 1 Issues in Competition L. & Pol'y 667, 669 (2008) ("A platform operating in a two-sided market serves two or more distinct sets of customers who, in some way, rely upon each other—and accordingly upon the platform—to realize the particular value the platform provides.").

[11] Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 40 ("The platform age is upon us because of the development of powerful information and communications technologies that have lowered the cost and increased the reach of connecting platform sides."); *see also id.* at 19 (citing "[t]he birth of the commercial Internet in the mid-1990s and mobile broadband in the early 2000s" as fueling the rise of the platform).

antitrust principles. *See Am. Express*, 138 S. Ct. at 2285. Companies providing multi-sided platform services do not fall neatly within traditional, vertical-supply categorizations. To allow "pass-on" injury claims against any company that connects sellers and buyers would risk exposing those companies to duplicative treble-damages recoveries, the very harm *Illinois Brick* sought to prevent.

Faced with the looming potential for outsize liability, businesses may reconsider how, to whom, or even whether to offer multi-sided platform services. Platform development is likely to be chilled as a result, with consumers and sellers—particularly small and medium-sized sellers—ultimately bearing the cost. These groups have enjoyed tremendous benefits from digital platform services, and they would experience significant harms in the event that platform services are curtailed. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that courts should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.").

A. The Ninth Circuit's Approach Threatens Digital Platform Services that Connect Sellers and Consumers in Innovative and Efficient Ways

Multi-sided, digital platform services have proliferated in recent years and have become an integral

part of the business models of many innovative companies, including CCIA members. By providing a centrally administered platform, these "matchmaking" services create significant value for both sellers and buyers in a number of different ways.[12]

First, companies operating successful digital platform services strive to provide a good consumer experience in order to retain buyers on the platform. This may include curating inventory to ensure sellers' offerings are high-quality, and "adopting standards, rules, and enforcement mechanisms to deal with externalities among platform participants."[13] The result benefits buyers *and* sellers, since high-quality offerings are essential to maintaining a sturdy base of customers.

Social media platforms, for example, create and maintain a high-quality user experience by enforcing community standards that govern various user groups. Twitter has developed a comprehensive set of "Twitter Rules" to "protect the experience and safety" of its users,[14] and the site has developed "Twitter Ads

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[12] David S. Evans, *The Consensus Among Economists on Multi-sided Platforms and the Implications for Excluding Evidence That Ignores It* at 3, *in* 6(1) CPI Antitrust Chronicle (June 2013), (multi-sided platforms "create value by coordinating the demands of multiple groups of customers").

[13] David S. Evans, *The Antitrust Analysis of Rules and Standards for Software Platforms*, 10 Competition Pol'y Int'l 71, 72 (2014).

[14] Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules.

Policies" to ensure that its advertisements are professional and respectful.[15] By contrast, commentators have attributed MySpace's market decline in part to insufficient management of advertisements and offensive content.[16]

Second, platform services enable consumers to make purchases with greater confidence that the sales process is trustworthy. That also benefits sellers in the form of greater customer reach and higher sales volumes. Because they permit consumers to make purchases through companies they trust, well-known platforms serve a valuable role in facilitating transactions between potential buyers and smaller, lesser-known sellers.

Companies often provide centralized payment processing as part of the bundle of platform services. Etsy and Wayfair are two examples.[17] Platform payment services benefit consumers by limiting the

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[15] Twitter, Twitter Ads Policies, https://business.twitter.com/en/help/ads-policies/introduction-to-twitter-ads/twitter-ads-policies.html#.

[16] Felix Gillette, *The Rise and Inglorious Fall of Myspace*, Bloomberg Businessweek (June 22, 2011), https://www.bloomberg.com/news/articles/2011-06-22/the-rise-and-inglorious-fall-of-myspace (among other things, discussing how the profusion of advertisements—including "gross-out ads"—negatively impacted the MySpace user experience).

[17] Etsy, Etsy Payments, https://www.etsy.com/payments (explaining that the Etsy payments system "allows buyers to pay using any of our 10 payment options in Etsy shops worldwide" and "in their local currency"); Wayfair, *What payment methods*

sharing of sensitive payment information to the trusted platform rather than each individual seller. Consumers can also store payment credentials centrally with the platform, which enables easier and faster transactions.[18] By lowering transaction barriers and facilitating sales, these tools also benefit sellers. Furthermore, well after a sale is completed, some platform services further increase reliability by providing customer service and satisfaction guarantees that supplement what sellers provide directly.[19]

Another ubiquitous mechanism for achieving reliability is the user rating. Online retail platform services like Etsy, for example, include built-in seller rating systems that allow consumers to shop with confidence and sellers—including small and medium-sized businesses—to enhance their reputation and visibility, and thus their reach and sales.[20] Similarly,

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do you accept?, https://www.wayfair.com/help/article/what_payment_methods_do_you_accept (listing over a dozen available payment methods).

[18] That a company provides payment processing services on its platform does not mean, however, that it is a "reseller" in the traditional sense. Much like a more traditional credit card processing service, technological developments allow the platform to facilitate payment transactions between a buyer and seller without taking "ownership" of the underlying product.

[19] *See, e.g.*, Etsy, Buyer Case Resolution, https://www.etsy.com/legal/policy/buyer-case-resolution/243306 189901 ("With Etsy's case system, members work together to resolve disputes that result in a non-delivery or are not as described."); Wayfair, Frequently Asked Questions, https://www.wayfair.com/help/faq.php (describing various customer support services).

[20] *See* Etsy, The Review System for Sellers, https://help.etsy.com/hc/en-us/articles/360000572708-The-Review-System-for-Sellers (explaining that "[b]uyers use Etsy's five-star review system (one

dining reservation services like OpenTable and Resy allow diners to rate restaurants, facilitating the flow of information about the quality of dining experiences.[21]

Third, platform services allow consumers to compare products and services across a vast number of sellers, which encourages innovation and price competition among sellers. Platform services also make it easier for buyers to connect and compare sellers through search and posting tools.

For example, travel websites like Booking.com and Hotel Tonight enable consumers to compare travel options from hundreds of different airlines and hotel companies.[22] E-commerce websites like Wayfair similarly allow consumers to evaluate hundreds of products, along with detailed product information,

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being the lowest and five being the highest) to review their purchases" and outlining review policies).

[21] OpenTable, Press Room, http://press.opentable.com ("The OpenTable service enables diners to see which restaurants have available tables, select a restaurant based on verified diner reviews, menus, and other helpful information, and easily book a reservation.").

[22] Booking.com "website and mobile apps are available in 43 languages, offer over 1.5 million properties and cover more than 121,000 destinations in 229 countries and territories worldwide." Booking Holdings, Booking.com, https://www.bookingholdings.com/brands/booking. Hotel Tonight "partner[s] with top-rated hotels" to identify "unsold rooms" and "each day's best deals." Hotel Tonight, *What We're About*, https://www.hoteltonight.com/about.

with every search.[23] These sites and many others place thousands of products and services side by side—lowering search costs and spurring price competition and innovation.

Real estate platforms like Redfin allow homebuyers to sort through lists of potential homes using filters—such as price, square footage, and location—across a large inventory of properties for sale.[24] Likewise, marketplace platforms like Wayfair and Etsy allow consumers to filter inventory from different sellers in various ways.

Finally, the rise of the platform economy has facilitated the development of new products and services and the entry of new competitors. Consumers seeking meal delivery used to be limited to pizza and a handful of neighborhood restaurants. But the explosion of meal-ordering applications, such as DoorDash, Postmates, and Caviar, created a new service, and consumers can now choose from a wide range of restaurant options to enjoy from the convenience of their homes.[25] Restaurants in turn benefit by broadening

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[23] For example, Wayfair operates a system of online ratings for what it describes as "one of the world's largest online selections of furniture, home furnishings, décor and goods, including more than ten million products from over 10,000 suppliers." Wayfair, About Wayfair, https://www.wayfair.com/v/about/wayfair.

[24] Redfin Press Center, About, http://press.redfin.com/phoenix.zhtml?c=252734&p=irol-about (online real estate platform with 80,000 customers that has facilitated over $47 billion in home sales).

[25] *See* Carsten Hirschberg et al., *The Changing Market for Food Delivery*, McKinsey & Co. (Nov. 2016), https://www.mckinsey.com/industries/high-tech/our-insights/the-changing-market-

their dining audience without having to expand their real estate space or ramp up their own delivery capabilities.

New products result in part from a platform service's ability to lower start-up costs for small businesses. For example, "online commerce platform[s]" like eBay have been shown to "empower[] the very smallest of businesses" to compete with larger companies even without "comparable in-house experience, expertise and resources."[26] Etsy, which connects "1.9 million active sellers" with "31.7 million active buyers," is an example of a platform service that lowers barriers to entry for new sellers and actively seeks to develop "creative entrepreneurs"—noting on its website that "[a]ll it takes is 20 cents to get started."[27] Similarly, on LetGo—"the largest and fastest growing app to buy and sell locally"—users can post a listing for free.[28]

Particularly relevant to this case, smart phones provide an example of how digital platform services provide consumer benefits. Mobile operating systems facilitate innovation by serving as a platform for *other* platforms—specifically, apps—which are constructed

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for-food-delivery ("Online food-delivery platforms are expanding choice and convenience, allowing customers to order from a wide array of restaurants with a single tap of their mobile phone.").

[26] eBay, *Platform-Enabled Small Businesses and Inclusive Economic Opportunities* at 3 (2016), https://www.ebaymainstreet.com/sites/default/files/ebay_report_pesbieo_vf.1_1.pdf.

[27] Etsy, Keep Commerce Human, https://www.etsy.com/about.

[28] LetGo, Who We Are, https://we.letgo.com.

as add-ons to mobile platforms.[29] "[O]perating systems for mobile devices have put the power of computers in the hands of billions of people and have enabled millions of developers worldwide to create apps for them."[30] Relatedly, because mobile operating platforms provide app developers with a highly efficient system for delivering their products to consumers, they need little in the way of start-up capital.[31] That opens the door to a wider variety of app developers and provides consumers with a broader selection of apps.

In all of these ways, multi-sided, digital platform services benefit consumers and sellers by "reduc[ing] frictions that get in the way of economic agents finding each other, interacting, and exchanging value on their own."[32] By bringing together large numbers of sellers and consumers—and lowering the costs required for them to interact—digital platform services

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[29] *See* Evans & Schmalensee, *Matchmakers*, *supra* note 3, at 40 (discussing "the creation of foundational multisided platforms" or "platforms-for-platforms," which include "fixed and mobile Internet service providers . . . and computer operating systems").

[30] *Id.* at 47.

[31] For example, "an individual or sole proprietor/single person business interested in creating apps for distribution on the App Store for iPhone, iPad, Mac, and Apple Watch" can "enroll in the Apple Developer Program" for $99 per year. Apple, Support: Choosing a Membership, https://developer.apple.com/support/compare-memberships. "Membership includes access to beta OS releases, advanced app capabilities, and tools to develop, test, and distribute apps and Safari extensions." *Id.*

[32] David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, Coase-Sandor Working Paper Series in Law and Economics, No. 753 (2016).

have delivered great benefits to both. Online platform services occupy an important role as matchmaker in today's digital economy, akin to the matchmaking role played by shopping malls and classified ads in earlier eras. If left standing, the Ninth Circuit's ruling could apply to the platform services described above and other matchmaking services in harmful and unintended ways.

B. Exposing Companies Offering Digital Platform Services to Duplicative Treble-Damages Claims Would Chill Innovation and Harm Consumers and Sellers

As described *supra* in Part I, the Ninth Circuit's ruling *invites* duplicative treble damages exposure by providing antitrust standing to multiple sets of plaintiffs under the Clayton Act's Section 4 based on a pass-on theory rooted in an initial alleged overcharge. The ruling threatens disproportionate harm to platform services that goes well beyond the treble damages Congress authorized by statute.

Businesses offering platform services are uniquely vulnerable under the Ninth Circuit's flawed analysis because they frequently interface directly with multiple distinct groups. The ruling would permit essentially any entity that uses a platform to allege an antitrust violation by the platform and sue the platform for treble damages based on a theory of passed-on overcharge, while at the same time barring a defendant from asserting a pass-on defense. In other words, the Ninth Circuit's decision converts the

chief virtue of a platform—fostering an efficient market for buyers and sellers to interact—into a potentially massive antitrust liability.

The result is foreseeable: If operating a digital platform service risks duplicative treble-damages lawsuits from every front (including class actions), companies providing these services likely will be less inclined to operate, expand, and innovate going forward. And by disproportionately affecting platform services, such increased antitrust exposure will chill new entry into this space. Thus, exposing companies to massive liability, simply for serving as an intermediary between parties, puts at risk the numerous benefits that digital platform services provide to both sellers and consumers.

Additionally, if companies providing platform services face increased exposure to treble-damages recoveries based on sales of third-party products and services, they may be less inclined to provide their services to third parties at all. Companies may instead choose to follow the single-sided platform model and focus on their own proprietary products, or at least reduce the number of platform partners. As a result, third-party sellers—particularly smaller and newer third-party sellers—would have fewer options to sell through platforms, and consumers would lose access to the broad variety of sellers currently available on platforms.

Apple, for example, started as a single-sided firm and did not allow third-party applications on the iPhone. Apple changed its model after seeing the benefits

of enabling a broader app ecosystem on competing mobile platforms. App developers and consumers likely would be worse off if Apple reverted to its original model.

The fallout from a reduction in platform services would not necessarily be limited to current platform users. In advanced economies like the United States, "[i]nnovation is the primary driver of economic growth."[33] By limiting incentives to innovate with new business models, the economy as a whole may suffer. Given the link between innovation and economic growth, "[c]aution and humility" is warranted in evaluating "innovative business practices."[34]

CONCLUSION

As applied to multi-sided, digital platform services, the decision below invites claims that rely on a flawed and unduly expansive conception of standing to avoid *Illinois Brick*'s bar on pass-on recovery. This

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[33] *See* David Teece, *Next-Generation Competition: New Concepts for Understanding How Innovation Shapes Competition Policy in the Digital Economy*, 9 J.L. Econ. & Pol'y 97, 196 (2012); *see also* Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1666 (2013) (antitrust authorities and scholars have long recognized the importance of innovation to economic growth and social welfare); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Competition L. & Econ. 153, 183 (2010) ("[T]here is a robust body of literature establishing the contributions of technological innovation to economic growth and social welfare.").

[34] Joshua D. Wright, Antitrust, Economics, and Innovation in the Obama Administration, *GCP: The Antitrust Chronicle* (Nov. 2009).

error exposes businesses offering digital platform services to massive and improper antitrust liability that is likely to harm competition, innovation, and consumers.

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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August 2018